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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 59.

CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

D. F. AND T. C. RANKIN, DEFENDANTS IN ERROR.

SUPPLEMENTAL BRIEF FOR DEFENDANTS IN ERROR.

CHAS. C. FOX,
Attorney for Defendants in Error.

W. B. MILLER,
Of Counsel.

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May it please the court:

No Federal Question Was Decided by the Lower Court in This Case.

Under the sixth, seventh, eighth, and ninth pleas filed by the plaintiff in error, the Railroad Company set up its compliance with the Interstate Commerce law, in this, that it had filed with the Interstate Commerce Commission its schedule of rates and tariff governing and controlling their shipment, and upon all these pleas the defendants in error joined issue

as shown by the record and the plaintiff in error made no proof whatever to show that it had complied with the Interstate Commerce law and filed its schedules as required by it and rested its case upon the belief that the court would *presume* it had fully complied with the law. The three courts of Tennessee in which this case has been tried, all held that they could not indulge in that presumption and that the plaintiff in error having failed to prove that it had complied with the Interstate Commerce law it was not entitled to the benefit of the decisions of this court on the Carmack amendment to this law and that the case would have to be tried, and was tried, according to the common law as interpreted by the courts of Tennessee. The whole question on this subject is a mere question of pleading and practice under the laws of Tennessee, and the courts of Tennessee having decided that question of pleading and practice against the plaintiff in error, there is nothing for this court to review. We fail to find that the plaintiff in error has cited any authority that would justify the lower court in presuming that it had filed its schedules with the Interstate Commerce Commission where the allegation that it had so done was denied by the defendants in error. The case of *Adams Express Company vs. Croninger* (226 U. S., 491), and other like cases decided by this court, since that decision, all rested upon the fact that the filing of a schedule of tariffs and rates with the Interstate Commerce Commission had either been proven or admitted, and none of these decisions have any bearing on this case at bar.

Section 6 of the Interstate Commerce Act and amendments thereto provide as follows:

> "No carrier, unless otherwise provided by this act, shall engage or participate in the transportation of passengers or property as defined in this act, unless the rates, fares, and charges upon which the same are transported by said carrier, have been filed and published in accordance with the provisions of this act."

The Interstate Commerce law just referred to expressly provides what the carrier shall do before he gets the benefit of the Interstate Commerce law. Section 16 of said act, and the amendments thereto, provide as follows:

> "The copies of schedules and classifications and tariffs of rates, fares, and charges and of all contracts, agreements, and arrangements between common carriers, filed with the Commission—as herein provided—shall be preserved as public records in the custody of the Secretary of the Commission and shall be received as *prima facie* evidence of what they purport to be, for the purpose of investigation by the Commission, and in all *judicial proceedings* copies of and extracts from any of said schedules, classifications, tariffs, contracts, agreements, arrangements, or reports, made public records as aforesaid certified by the Secretary, under the Commission's seal, shall be received in evidence with like effect as the original."

Why did Congress provide how these schedules of rates and tariffs filed with the Commission were to be introduced in judicial proceedings if the courts were going to presume that they had been filed without the railroad making the proof thereof, as provided by the act of Congress?

In the case of the *Railroad vs. Horn* (2 Pick., 73), and which is cited by the Tennessee court in its opinion on the question here discussed, Mr. Justice Wilkes in the opinion cited says as follows:

> "Some publication is presumed to have been directed, but none is shown to have been made.
>
> "This excludes the case from the operations of the Federal statute and leaves the plaintiff with his rights under the bill of lading unimpaired and enforceable in this suit. It may be that this company and its associates have subjected themselves to the penalty of that law. Whether they have or not, it is not the province of this court to decide. It is certain they have failed to establish compliance with one of the preliminaries necessary to put it in operation as to plaintiff."

After citing the above authority and others the Tennessee court in the case under trial makes the following conclusion on this question:

> "We have upon these authorities no hesitancy in reaching the conclusion and in fact it hardly appears debatable to us that it was incumbent upon the Railroad Company in this case in the present state of the pleadings, to show by proof that it had met the requirements of the Interstate Commerce Act and this burden it failed to carry and having failed to do so it cannot rely upon presumption."

The facts of this case show that this whole question about whether or not the plaintiff in error had complied with the Interstate Commerce Act and filed its schedule of tariffs and rates with the Interstate Commerce Commission, was under the pleadings in this case a question of pleading and practice under the laws of Tennessee and nothing else but a question of pleading and practice and upon this subject we wish to briefly cite the following authorities of this court on that subject.

In the case of *Arkansas Southern Railway Company vs. German National Bank* (207 U. S., 270), which was a suit against the Railroad Company for the failure to deliver certain cotton and which was tried out in the courts of Arkansas and was decided by this court September 2, 1907, this court on the Federal question involved uses the following language:

> "But according to the well-settled doctrine of this court with regard to cases coming from State courts, unless a decision upon a Federal question was necessary to the judgment, or, in fact, was *made the ground of it*, the writ of error must be dismissed. And even when an erroneous decision upon a Federal question is made a ground, if the judgment also is supported upon another, which is adequate by itself, and which contains no Federal question, the same result must follow as a general rule. Therefore, if we should be

of opinion, as we are, that the Supreme Court rested its judgment upon principles of common law, we should go no farther, although that court also upheld and relied upon the statute, whether in our opinion its views were right or wrong."

And the writ of error in the case just cited was dismissed.

"The jurisdiction of this court to review the proceedings of the State courts, as we have had frequent occasion to declare, is not that of a general reviewing court in error, but is limited to the specific instances of denials of Federal rights, whether those pertaining to the constitutionality of Federal or State statutes, or to certain rights, immunities, and privileges of Federal origin, specially set up in the State court and denied by the rulings and judgment of that court. Sec. 709, Rev. Stat. U. S. Nor does this court sit to review the findings of facts made in the State court, but accepts the findings of the court of the State upon matters of fact as conclusive, and is confined to a review of questions of Federal law within the jurisdiction conferred upon this court. *Quimby vs. Boyd,* 128 U. S., 488; *Egan vs. Hart,* 165 U. S., 188; *Dower vs. Richards,* 151 U. S., 658; *Thayer vs. Spratt,* 189 U. S., 346. We shall not, therefore, undertake to follow counsel in the consideration of all the questions argued, but shall limit our review to questions of a Federal nature which we deem to be properly made in this record and essential to the decision of the case." (Taken from *Waters-Pierce Oil Co. vs. Texas,* No. 1, 212 U. S., 97.)

"There is some discussion in the briefs as to whether the provision was repealed by the statute of 1884, which was in apparent conflict with it, but upon this record that is not a Federal question. There was neither allegation nor proof that the court of last resort in Louisiana had considered the question or made any ruling upon it, and so it became the duty of the Texas courts, which do not take judicial notice of decisions of courts of other States, to decide the question according to their independent judgment. *Louisville and Nashville R. R. Co. vs. Melton,* 218 U. S., 36, 52. This they did and, no Federal right being involved,

their decision is not subject to review by this court. *Eastern Building and Loan Ass'n vs. Ebaugh*, 185 U. S., 114.

"Of the ruling that the defect in the complaint was cured by the answers little need be said. While recognizing that the right created by the Louisiana statute was qualified by the one-year limitation and that the Texas courts could not disregard the qualification without impinging upon the full faith and credit clause of the Constitution, we think the claim that they did not disregard it is quite untenable. The action was begun within the time prescribed, and what the Texas courts really held was that the omission from the complaint of an essential allegation was cured by its inclusion in the answers. In so holding they but gave effect to a generally recognized rule upon the subject. *U. S. vs. Morris*, 10 Wheat., 246, 286. There was no shifting from one right of action to another, as in *Union Pacific Railway Co. vs. Wyler*, 158 U. S., 285, and *U. S. vs. Dalcour*, 202 U. S., 408, 423, but on the contrary, an adherence to the right originally asserted. In these circumstances nothing more was involved than a *question of pleading and practice in the Texas courts, and its decision by them is final.*" (Taken from Texas and N. O. R. R. Co. *vs.* Gross, 221 U. S., 415.)

"This court has had frequent occasion to say that its right to review the judgment of the highest court of a State is specifically limited by the provisions of § 709 of the Revised Statutes of the United States. This right of review in cases such as the one at bar depends upon an alleged denial of some right, privilege or immunity specially set up and claimed under the Constitution, or authority of the United States, which it is alleged has been denied by the judgment of the State court. In such cases it is thoroughly well settled that the record of the State court must disclose that the right so set up and claimed was expressly denied, or that such was the necessary effect, in law, of the judgment. Sayward *vs.* Denny, 158 U. S., 180, 183; Harding *vs.* Illinois, 196 U. S., 78; Waters-Pierce Oil Co. *vs.* Texas, 212 U. S., 86, 97." (Taken from Seaboard Air Line Ry. *vs.* Duvall, 225 U. S., 487.)

> "The allegations and admissions in one part of the defendant's answer were held to overcome the denials in another and complaint is made of this, but, as it appears that nothing more than *a question of local pleading and practice was involved, the ruling is not open to review in this court.* Judgment affirmed." (Taken from Texas and Pacific Ry. *vs.* Rosborough, 235 U. S., 429.)

The facts of the case on trial, under the opinions of this court above referred to, we think show conclusively that no Federal question was involved or decided by the State court, but it was only a question of pleading and practice under the laws of the State of Tennessee, and, therefore, we think that the writ of error should be dismissed.

The Amount of Liability.

The plaintiff in error having failed to show that it had complied with the Interstate Commerce law, it was therefore not entitled to the benefit of the decisions of this court under the Carmack amendment, on the question of the amount of liability of the carrier to the shipper. In other words, under the facts of this case the law of this case was controlled by the common law as interpreted by the courts of Tennessee.

The proof in this case, we think, not only shows negligence upon the part of the carrier, but the grossest kind of negligence which resulted in the death of the fireman on the engine, and of one of the engineers, and of the loss and destruction of nineteen head of stock belonging to the defendants in error. And on the question of the amount of liability we ask the consideration of this court to the case of the *Pennsylvania Railroad Company vs. Hughes* (191 U. S., 477), and also to the case of *Galveston, H. and S. A. Ry. Co. vs. Wallace* (223 U. S., 481), in which latter case this court uses the following language:

> "The carrier and its agents, having received possession of the goods, were charged with the duty of delivering them, or explaining why that had not been

done so. This must be so, because carriers not only have better means, but often the only means, of making such proof. If the failure to deliver was due to the act of God, the public enemy or some cause against which it might lawfully contract, it was for the carrier to bring itself within such exception. In the absence of such proof, the plaintiffs were entitled to recover, and the judgment is affirmed."

Assuming, for the sake of argument, that the Carmack amendment to the Interstate Commerce law controls this case, then what are the results.

The Carmack amendment changed the law in this, that it made the initial carrier liable to destination, and it also provided that this liability should be for *any damage* or *injury* to property *caused by it*, or any connecting carrier. Assuming that the words *"caused by it,"* modified the carrier's common-law liability, the proof in this case shows that the damage sued for was *caused* by the plaintiff in error, and that the railroad was not only guilty of negligence but gross negligence. The Carmack amendment does not fix the amount or limit the amount of liability for damage caused by it.

Under the decision of this court in the Croninger case so often referred to by plaintiff in error, the amount of liability, or limitation of liability, can only be regulated by the carrier filing with the Commission its schedule of rates and charges to be approved by said Commission regulating the amount of liability according to rates and charges, and plaintiff has wholly failed to show that it has ever filed with the Commission any schedule of rates and charges, and the damage to the property of defendants in error having been caused by plaintiff in error, even under the Carmack amendment the judgment of the State court should be affirmed.

Wherefore we respectfully ask that the writ of error be dismissed or that the judgment of the State court be affirmed.

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